In the Matter of Interest Arbitration	)	
	)	
between	)	FINAL OFFER ARBITRATION
	)	
CITY OF MISSOULA, MONTANA	)	
	)	
and	)	
	)	
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, Local 271	)	

BEFORE:	Carlton J. Snow, Professor of Law
APPEARANCES:	For the City: Mr. Bruce Bischof
	For the Union: Mr. Karl Englund
PLACE OF HEARING:	Missoula, Montana
DATES OF HEARINGS:	March 18-19, 2002
POST-HEARING BRIEFS:	April 18, 2002

TABLE OF CONTENTS

			Page
I.	Introduction		1
II.	Nature of Final Offer Arbitration		4
III.	Evaluating Specific Issues		13
	A.	The Issue of Clothing Allowance	13
	B.	The Issue of the Work Week	16
	C.	The Issue of Overtime Pay	17
	D.	The Issue of Sick Leave	22
	E.	The Issue of Vacancies-Promotions	23
	F.	The Issue of the Grievance Procedure	28
	G.	The Issue of Wages	30
	H.	The Issue of Longevity Pay	38
	I.	The Issue of Special Certification Pay	40
	J.	The Issue of Insurance	47
		AWARD	55

IN THE MATTER OF INTEREST ARBITRATION	)	
BETWEEN	)	
CITY OF MISSOULA, MONTANA	)	ANALYSIS AND AWARD
AND	)	Carlton J. Snow Arbitrator
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, Local 271	)	

I. INTRODUCTION

This matter came for hearing pursuant to Section 39-34-101 and following of the Montana Arbitration for Firefighters Act. Section 39-34-101(2) of the Act states:

> If an impasse is reached in the course of collective bargaining between a public employer and a firefighters' organization or its exclusive representative and if the procedures for mediation and fact-finding in 39-31-307 through 39-31-310 have been exhausted, either party or both jointly may petition the board of personnel appeals for final and binding arbitration.

After the parties found themselves at impasse in this matter, they presented unresolved issues to the interest arbitrator. There is no challenge to the statutory authority of the arbitrator to resolve the dispute.

In making determinations, the arbitrator has followed statutory requirements set forth by the legislature in the Act. With regard to making a decision, statutory requirements are as follows:

> In arriving at a determination, the arbitrator shall consider any relevant circumstances, including:
>
> (a) Comparison of hours, wages, and conditions of employment of the employees involved with employees performing similar services and with other services generally;
> (b) The interests and welfare of the public and the financial ability of the public employer to pay;
> (c) Appropriate cost-of-living indices;
> (d) Any other factors traditionally considered in the determination of hours, wages, and conditions of employment. (*See* MCA, § 39-34-103(5).)

Hearings occurred on March 18-19, 2002 in a conference room of the City Hall located in Missoula, Montana. Mr. Bruce Bischof, attorney, represented the City of Missoula, Montana. Mr. Karl Englund, attorney, represented Local 271 of the International Association of Firefighters. The hearings proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates fully and fairly represented their respective parties. Ms. Mary Sullivan of Sullivan Court Reporting reported the proceedings for the parties and submitted a transcript of 417 pages.

There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties stipulated that the matter properly had been submitted to arbitration. The parties elected to submit the matter on the basis of evidence presented at the hearing as well as post-hearing briefs. The arbitrator officially closed the hearing on April 18, 2002 after receipt of the final brief in the matter.

The city has a growing population. Missoula, Montana has four fire stations staffed 24 hours a day, seven days a week. There are 64 firefighters engaged in the work of fire suppression. Each of the four platoons in the division has a battalion chief, four captains, and at least 11 firefighters. One platoon is always on duty. Four members of the bargaining unit are in the Fire Prevention Bureau. A mechanic. a training officer, and an emergency medical services coordinator also are members of the bargaining unit. Firefighters work two 10-hour days, then two 14-hour nights, followed by four days off. Fire suppression personnel work 2,190 hours a year, and nonsuppression personnel work a 40 hour week.

II. THE NATURE OF FINAL OFFER ARBITRATION

MCA Section 39-34-103(4) instructs an interest arbitrator to make "a just and reasonable determination of which final position on matters in dispute will be adopted." This is an interest arbitration dispute resolution process known variously as "final offer" arbitration or "last best offer" arbitration or "either-or" or even as "baseball" arbitration. It is an ancient dispute resolution process that some scholars trace to the famous trial of Socrates in Athens in 399 B.C. (*See* Stone, *The Trial of Socrates*, p. 186 (1988).) Final offer arbitration limits an arbitrator to choosing the final offer made by one of the parties. The arbitrator may not mix and match the offers or compromise the parties' final positions.

Attributes of final offer arbitration are best understood when it is compared with traditional interest arbitration. In traditional interest arbitration, parties submit their respective positions to an arbitrator who, in turn, either selects all of one party's position generally on an issue by issue basis or, alternatively, crafts a compromise between the two positions and, on occasion, presents a unique solution not included in either position of the parties. Traditional interest arbitration on an issue by issue or package basis is customarily criticized because it gives parties at the negotiation table a disincentive to bargain in good faith. The belief of some scholars is that the

availability of traditional interest arbitration causes parties to negotiate less seriously prior to arbitration on the theory that they may receive a better contract from an interest arbitrator than from the negotiation process. In anticipation that an arbitrator in traditional interest arbitration will find a middle ground between the positions of the parties, negotiators may be inclined to under-rate the risks of proceeding to arbitration and may engage in posturing during negotiations. Parties in conventional arbitration may fear that any movement from their initial bargaining position will indicate a lack of resolve and will undermine their eventual success in traditional interest arbitration. They speculate that, if the matter gets to an interest arbitrator, he or she using a traditional approach will award at least some of what a party seeks in bargaining. The folklore is that a traditional interest arbitrator merely "splits the difference" between the parties' positions.

Final offer arbitration attempts to respond to many of these problems by making it far more risky to proceed to arbitration. Since an arbitrator proceeding under a final offer system may not compromise the parties' final offers, the risk is that the final offer of the other party will be adopted by the arbitrator if a final offer contains unreasonable aspects in it. The possibility of losing entirely in arbitration theoretically encourages parties to engage in good faith negotiations and encourages the parties to exchange

their most reasonable positions prior to proceeding to arbitration. By requiring parties to exchange final offers prior to proceeding to an arbitration hearing, the final offer system causes parties to share previously concealed data, the absence of which information might have been inhibiting the negotiation process. The Montana legislature made a policy judgment that an interruption of essential fire protection services cannot be tolerated and that final offer arbitration is the type of impasse procedure best suited to meet the needs of the public. Few studies have been conducted on the success of public sector final offer arbitration, but early studies indicated that the availability of such a system helped parties reach negotiated agreements and avoid work stoppages. (*See, e.g.* Gordon, 63 Univ. of Colo. L. Rev. 751 (1992); Howlett, 60 Kent L. Rev. 815 (1984); and Witney, 96 Monthly Lab Rev. 20 (1973).)

In addition to the statutory requirement, the parties in their 1997-2000 collective bargaining agreement codified final offer arbitration as the ultimate method of resolving the next collective bargaining agreement between them. They agreed to submit their "final offer" package to an interest arbitrator prior to a hearing along with a copy of any draft agreement on resolved issues. The parties agreed that:

> With respect to each remaining item, the arbitrator's award shall be restricted to the final offer on each unresolved issue submitted by the parties to the arbitrator. The arbitrator shall select and inform the parties hereto, in writing, within thirty (30) days after it's [sic] meeting, as to the most reasonable offer in it's [sic] judgment, of the final offers on each unresolved issue submitted by the parties. (See 1997-2000 Agreement, p.13, emphasis added.)

What the Montana legislature left somewhat ambiguous, the parties made clear in their collective bargaining agreement. Although final offer arbitration is the method of dispute resolution, it is to be conducted on an issue-by-issue basis. By contract, the parties agreed that the decision of the interest arbitrator is to be combined with any of their negotiated agreements to form the next collective bargaining agreement between the parties.

Although final offer arbitration systems are designed to increase pressures on negotiators to engage in serious bargaining and to settle their differences through face-to-face negotiations, the fail safe is that they proceed to interest arbitration if their negotiations prove to be unsuccessful. Inherent in the system is an expectation that the risk of losing in arbitration is so great the parties will overcome any intransigent positions and will avoid insisting on any unreasonable positions. The parties in this case were not completely successful in their negotiations and submitted some issues to final offer arbitration. The system is designed to restrict the arbitrator from introducing

his own viewpoint or prejudices. Despite the statute's mandate that an interest arbitrator make "a just and reasonable determination" of unresolved issues, a fundamental purpose of final offer arbitration is to shackle the power of the arbitrator and to give him or her precious little equitable authority. It might be supposed that such authority is to be found in the statutory requirement that an arbitrator use as a decision-making point of reference "the interests and welfare of the public," but the legislature made no effort to define the term. (*See* MCA § 39-34-103(5)(b).) The U.S. Supreme Court has made clear that statutory references to the "interest and welfare of the public" do not provide a decision-maker with a broad license to promote the general welfare.

The point is that, despite the effort of final offer systems to avoid chilling face-to-face negotiations by eliminating an arbitrator's authority to mix and match offers, final offer arbitration is not without its flaws. Parties continue to become locked in on a position believing it is correct and, therefore, beyond compromise. Each party can conclude that its position is the one most representative of what is best for the public. Most notably, a party may submit a proposal to the arbitrator that in many respects is reasonable but that includes "sleeper" issues designed to cause utter chaos to the other party. Sometimes both final offers contain "sleeper" issues, and the

arbitrator is faced with the agonizing dilemma of choosing between two unacceptable demands.

Ten issues remained unresolved at the end of the bargaining process in this case. During the course of the interest arbitration hearings, the parties reached agreement on two of the ten issues. While some issues are clearly more important than others, all the issues generally can be characterized as involving either economic or noneconomic concerns. Both Montana law as well as the parties' last collective bargaining agreement mandate a consideration of economic concern and, in particular, an employer's ability to pay. Accordingly, a review of economic implications raised by the parties is an appropriate departure point.

Montana law makes clear that an employer's ability to pay is a key factor in deciding which offer to accept when engaged in interest arbitration decision-making. During the course of the proceedings, both parties presented volumes of material with regard to the financial health and stability or instability of the Employer; and the parties debated the ability of the Employer to afford changes proposed by the Union as well as to justify reductions proposed by the Employer. They submitted considerable highly technical and complex fiscal information with regard to the Employer's

budgeting needs and planning processes, and all data have been duly scrutinized.

Montana is generally not regarded as one of the fiscally wealthier states in the nation. With regard to personal income, the State of Montana ranks among the lowest. The City of Missoula, with a population of under 60,000, is the second largest city in the state. It endures many of the economic pressures faced by other sparsely populated communities. Low population, coupled with low individual incomes, often translates into financing difficulties, even with regard to basic necessities of a community, such as police, fire, and medical services.

A primary emphasis of the Employer was that the City of Missoula simply cannot afford the level of increases requested by the Union. Mayor Mike Kadas testified extensively with regard to the Employer's current budgetary shortfall and the less than optimistic fiscal outlook for the coming year. His testimony suggested that the City of Missoula has limited means of generating new capital. Assessing property taxes is the primary means of providing the Employer with revenue; and in 1996 voters capped the authority of the Employer to assess more property taxes. Mayor Kadas asserted that, in view of the fact that the City of Missoula currently charges one of the highest property tax rates in the state as well as the state generally

having low personal income, the Employer can ill afford new expenses. While recognizing that there is some maneuverability, Mayor Kadas was firm in his conviction that the current budget provides virtually no flexibility.

But interest arbitrators long have taken the position that an adopted budget is not the ultimate measure of a public sector employer's ability to fund a proposal. If a self-imposed budget were accepted as a means of testing an employer's ability to pay, statutorily mandated collective bargaining would become meaningless. Nor is the "ability to pay" statutory factor the only one meriting consideration, and the legislature has not mandated that it be assigned dispositive weight.

At the same time, the Employer's concern with regard to a budgetary shortfall is legitimate. Evidence submitted to the arbitrator made clear that voter restrictions on the Employer's ability to assess property taxes coupled with the absence of a sales tax as another source of funding substantially limits the Employer's stream of revenue. If the Union's economic proposals are to be accepted, the Employer necessarily must generate funds to pay for the increases; and additional taxes might provide the only solution. The evidentiary record made clear that the general public would not look with favor on such a result.

The City of Missoula, of course, has a "General Fund" from which unexpected, unbudgeted financial needs might be met. It is the argument of the Union that this is the source of funds from which its proposal can be paid. At first blush, it would appear that the Employer could afford to pay for the Union's proposal from its General Fund, but this tentative conclusion merits closer inspection later in the report.

It is important to recognize that the fire department is merely one component making up the budgetary picture for the city of Missoula. The Employer must consider all its financial needs in the various departments when determining the allocation of the city budget. The needs of one department must be weighed against financial needs of the city as a whole. There also was unrebutted testimony that even the General Fund which might be used to pay for shortfalls and unexpected occurrences is often already "earmarked" for special projects which cannot be ignored. A preliminary concern is whether or not funding the Union's proposal would exhaust General Fund revenue to the point of eliminating any safety net for unexpected occurrences. Within the context of these constraints, the parties over a two day period addressed the specific disagreements between them.

III. EVALUATING SPECIFIC ISSUES

A. The Issue of Clothing Allowance

1. Position of the Parties

a. The Employer

Section 1. Employees shall receive a clothing allowance of Four Hundred Twenty Dollars ($420.00) for FY 2001; Four Hundred Forty-one ($441.00) for FY 2002, Four Hundred Sixty-three Dollars ($463.00) for FY 2003, and Four Hundred Eighty-six Dollars ($486.00) for FY 2004.

Section 4. The clothing allowance shall be issued no later than September 1 of each fiscal year.

b. The Union

Section 1. Employees shall receive a clothing allowance of Five Hundred Dollars ($500.00) for FY 2001.

Section 4. Beginning FY 2002, the clothing allowance shall be increased by five percent (5%) each year. The clothing allowance shall be issued no later than September 1 of each fiscal year.

2. Discussion

It is the position of the Employer that, since this is an issue of clear financial implications, consideration of the City's ability to pay for a proposed increase is appropriate. While acknowledging that the Union's proposed change to the amount allocated for clothing allowance is relatively minor compared with other proposals, it is the belief of the Employer that the

proposal, nonetheless, is significant in terms of its financial impact. It is the conclusion of the Employer that the Union's proposal of $500.00 a year is too high and that a 5% escalator clause is not reasonable. The City asserts that, contrary to the Union's contention, the price of clothing currently is "relatively flat" and actually has dropped in some places. According to the City, its proposal is more consistent with the actual cost of clothing to be purchased by members of the bargaining unit. Moreover, the City contends that management's proposal calls for a substantial increase and that the increase is more than adequate to reimburse firefighters for clothing expenditures.

The Union would increase the clothing allowance $500.00 initially with a 5% annual increase during the duration of the contract. It is the belief of the Union that the current allowance of $318.46 is insufficient, due primarily to the use of more expensive material now worn by firefighters. It is the contention of the Union that its position is reasonable and merits inclusion in the next agreement between the parties. The Union reasons that, when the clothing allowance in the parties' agreement initially came into existence, firefighters in the bargaining unit wore primarily cotton clothing. Now bargaining unit members generally wear a fabric called Nomax. Nomax is a fire retardant fabric and has replaced many items of cotton clothing. It is

a somewhat more expensive product, and its price has dramatically increased during the past several years. (*See* Union's Post-hearing Brief, p. 5.) The Union contends that the City's proposal is insufficient to keep up with the cost of the more expensive clothing.

On one level, this is not one of the more important issues about which the parties disagree. On the other hand, the fact that the parties have engaged in bargaining for many months and have been unable to resolve the issue suggests that it has considerable significance to both sides. While it is recognized that the cost of Nomax has increased substantially, the Employer's proposal includes an increase in the amount of the clothing allowance. The major problem with the Union's proposal is the clause calling for an automatic 5% increase during the term of the agreement. Evidence suggested a slowing in the price increases of Nomax, and the Union failed to justify its escalator clause.

3. Decision

The proposal of the Employer with regard to clothing allowances shall become a part of the next agreement between the parties.

B. The Issue of the Work Week

1. Position of the Parties

a. The Employer

With the approval of the Fire Chief, staff employees may flex their work schedule.

b. The Union

At their discretion and with the approval of the Fire Chief, staff employees may flex their work schedule.

2. Discussion

At the close of the arbitration proceedings, the Union agreed to the City's proposed changes to the collective bargaining agreement with regard to Work Week.

3. Decision

The Employer's proposal with regard to Work Week shall become a part of the next agreement between the parties.

C. The Issue of Overtime Pay

1. Position of the Parties

a. The Employer

Section 3. To receive pay from the time of the call, an employee must report to the assigned location within 30 minutes. If the employee fails to report within 30 minutes, after a review of the circumstances, and at the discretion of the Fire Chief, pay may begin from the time of arrival at the assigned location.

Section 5. Compensatory time will be used prior to using accumulated vacation or holiday time.

If granted, compensatory time will be at straight time unless more than 61 hours are worked in the eight day period. Any compensatory time accumulated greater than thirteen (13) hours in the eight-day period will be granted at time and one half. Compensatory time will not be granted for certification, recertification, or continuing education training that applies to Special Certification Pay as outlined in Appendix A where state and/or federal requirements are established.

b. The Union

Current contract language.

2. Discussion

Under the City's proposed modification to Article XIV, an employee may not receive overtime pay unless he or she has worked more than 61 hours in an eight-day period. The City's proposal would also require

that any compensatory time an employee accumulated must be used prior to using vacation or sick leave. The proposal also excludes receiving compensatory time for activities such as certification or other educational training, except as required by state or federal law. The Employer stated as its justification for the modification its need to confront serious financial problems facing the city. The Employer believes that its proposal would "level the playing field somewhat with other comparable departments that work a significantly longer work week by reducing the compensatory time off liability," and would enable the Employer to make overtime payments in a manner "consistent with the Fair Labor Standards Act." (*See* Employer's Post-hearing Brief, p. 24.)

The Union views the Employer's proposed changes as unjustified. Relying on standard criteria to justify altering the status quo, the Union concludes that (1) the conditions under existing contract language are workable and equitable; (2) the Employer seeks a benefit without providing a quid pro quo; and (3) there is no compelling operational need for such a change.

The shape of a bargaining agreement is constantly changing. In each negotiation, the relationship of the parties develops and evolves in a way that responds to old problems and anticipated new ones. During the term of

an agreement, the parties themselves are in a position to respond to pressing situations not specifically addressed in their agreement. A Memoranda of Understanding or side bar letters regularly cover matters not addressed in contract negotiation. Memoranda of Understanding are incorporated into the parties' contractual commitment and must be honored as a part of the main agreement itself. But such memoranda can be added later by the parties, and an interest arbitrator is in the position of anticipating future needs of parties.

The design of interest arbitration is that an interest arbitrator "stands in the shoes" of the parties (while also representing the interest of the public) and attempts to approximate what the parties themselves would have negotiated had their negotiations culminated in an agreement. Underlying this assumption is a belief that the parties share common problems and that solutions can be found benefiting both parties. The point is that changes in the parties' relationship must be rooted in the overall operation of the workplace and in their solving group problems or enhancing job enrichment. It is reasonable to believe that, had the parties themselves negotiated successfully, their objective would have been to create a positive climate in the workplace that enhanced respect for each other. They would have avoided provisions in their labor contract that institutionalize distrust and

suspicion. Their mutual desire would be to create a more energetic, productive enterprise beneficial to everyone.

As a substitute for collective bargaining, interest arbitration is a device for resolving a recognized problem more than it is a method of attempting to predict the future. If a party put a proposal on the bargaining table in direct negotiations and, in effect, said "I want it because I want it," such a proposal would represent a raw assertion of power and no doubt would end up being taken off the table because it resolved no operational need. An objective of interest arbitration is to produce a final package that reasonably approximates what the parties themselves would have reached with hard bargaining. The objective of an interest arbitrator must be that of making a decision within the context of statutory criteria and relevant contractual guidelines as applied to a group of specific final offers. Within that context, one scholar has described the work of an interest arbitrator as follows:

> The role of the interest arbitrator is to attempt to apply these principles to the dispute <u>while remaining faithful to the relationship of the parties.</u> It is not the role of the arbitrator nor the purpose of the standards to alter the ultimate balance of power between the parties. Rather, the role is to resolve the issues in dispute and, thereby, to restore the disturbed balance between them. (*See* 42 Arb. J. 13, 22 (1987), emphasis added.)

Evidence submitted to the arbitrator failed to describe a substantial and significant problem to be resolved by the City's proposed addition to the next agreement between the parties. No evidence showed a pattern of late responses by employees called back to work from off duty. The history of the parties' relationship explained how the current system of compensatory time came into existence. Nor did specific evidence about the size of the cost saving of the Employer's proposal justify the substantial departure from existing practices. Moreover, it is imprudent to incorporate into the parties' agreement a provision of questionable legality that, no doubt, would produce expensive litigation between the parties.

3. Decision

Article XIV (Overtime Pay) as it appeared in the 1997-2000 agreement shall continue to be a part of the next collective bargaining agreement between the parties.

D. The Issue of Sick Leave

1. Position of the Parties

a. The Employer

Section 3. Abuse of sick leave may be cause for progressive disciplinary action and forfeiture of lump sum sick leave payments in accordance with 2-18-618 MCA.

b. The Union

Abuse of sick leave may be cause for progressive disciplinary action and forfeiture of lump sum sick leave payments.

2. Discussion

At the arbitration proceeding, the Union agreed with the Employer's proposed change to the language in Article XVII (Sick Leave).

3. Decision

The Employer's proposal with regard to Sick Leave shall become a part of the next agreement between the parties.

E. The Issue of Vacancies

1. Position of the Parties

a. The Employer

When a job position vacancy occurs in any position, it shall be filled within forty-five (45) days, unless otherwise mutually agreed. Filling of all vacancies [is] to be in accordance with provisions of the City of Missoula Personnel Policies adopted by Administrative Rules and Appendix C (Promotion Policy) of this agreement.

b. The Union

When a job position vacancy occurs in any position, it shall be filled within forty-five (45) days, unless otherwise mutually agreed. Filling of all vacancies, with the exception of promotions, [is] to be in accordance with provisions of the City of Missoula Personnel Policies adopted by Administrative Rules. Promotions will be governed by past practice except as provided in Appendix C.

2. Discussion

The proposal of the Employer is that the positions of Captain and Battalion Chief be awarded competitively, rather than by strict seniority, as is required under current contract language . According to the Employer, changing the manner in which these positions are awarded will bring the City of Missoula into line with the practices of comparable fire departments. It will also serve a compelling need to have only the most qualified, experienced personnel holding these higher level positions, in the opinion of the Employer.

The City justified its proposal in part by comparing of itself with practices in other fire departments. According to the Fire Chief, no other fire department awards the positions of Captain and Battalion Chief based on seniority alone but, rather, bases promotional decisions on some reasonable qualification standard. The City believes that promotion to these high level positions should not be viewed as an entitlement based on years of service. The Employer argues that the leadership qualities and experience required for such high level positions demand a reasonable consideration of an employee's ability to perform the job in contrast with focusing exclusively on the amount of a person's tenure in the department.

The Union responds that it, too, wants to move beyond the current system to a performance-based approach to promotion. Accordingly, the Union would change the current "strict seniority" formula and establish a committee comprised of union and management personnel. The committee would establish qualifications to be required for the positions, and the Union would support incorporating such qualifications into the parties' collective bargaining agreement. Pursuant to the Union's proposal, promotion to the position of Captain and/or Battalion Chief, then, would be awarded to the most senior employee who met the qualifications set by the committee. The

Union cites several reasons why its proposed change is more reasonable than the Employer's.

First, the Union contends that its proposal incorporates both performance-based and seniority-based considerations and, therefore, more fully satisfies the needs of both parties. It is the belief of the Union that allowing a bilateral committee to establish reasonable qualifications will insure that only qualified individuals receive the position. Additionally, it is the position of the Union that requiring the positions to be awarded to the most senior employee who meets all relevant criteria protects workers who have served the Employer loyally for many years.

The Union also sees its proposal as a less drastic change from the one presented by the Employer. The Union also believes that its proposal would function more smoothly than the City's approach to the problem. According to the Union, current contract language inhibits competition for promotion to Captain or Battalion Chief and results in less incentive for employees to improve their performance. It is the belief of the Union that its proposal actually would increase teamwork within the department and encourage employees to strive to enhance the quality of their performance. The Union also believes that its proposal more adequately recognizes the importance of experience in these high level positions and that, without such

experience, there is a high likelihood of a "dangerous and uncontrolled environment." (*See* Union's Post-hearing Brief, p. 16.) It is also the position of the Union that its proposed changes to Article XIX are better for the relationship of the parties because the contractual requirements would be clear and unambiguous. Firefighters would know exactly what was expected of them if they wished to attain the position of either Captain or Battalion Chief. Moreover, an approach that combines performance with seniority would encourage longevity with the Employer, according to the Union. It is the conclusion of the Union that the City's proposal would codify indefinite criteria and well might inhibit any incentive for long-term employment.

The parties are in agreement about one fact, namely, that a change needs to be made. They disagree about the nature of the change. The Employer presented evidence which the Union did not seriously dispute to the effect that the vast majority, if not all relevant departments, base promotional decisions for these positions on some form of merit. It is self-evident that a Battalion Chief or a Captain needs not only years of experience within the department but also requires considerable personal insight, leadership ability, and communicative skills in contacts not only with bargaining unit members but with management as well. Development of such skills is not assured merely by time in rank.

The Employer has a legal duty, within the context of a work force doing dangerous work, to provide a safe workplace and also to protect the public. The Employer's proposed system for determining the most qualified candidate for these positions sets forth a highly complex scoring system in which seniority has no place, but the emphasis on knowledge and practical leadership ability preserve the place of seniority. The Employer takes the selection of employees for these positions quite seriously and places the highest priority on maintaining safety in the community. While changes proposed by the employer are a significant departure from the current approach, both parties recognize that a departure is necessary. The Employer's proposed criteria are not unreasonable and are legitimately grounded in genuine concern for public safety and welfare.

3. Decision

The Employer's proposal with regard to Article XIX (Vacancies-Promotions) shall become a part of the next agreement between the parties.

F. The Issue of the Grievance Procedure

1. Position of the Parties

a. The Employer

Section 1. Step 1. In the event an Employee has a grievance, he/she shall, within sixty (60) calendar days of the grievance occurrence, notify the Union in writing of his/her grievance.

b. The Union

Section 1. Step 3. In the event the parties are unable to agree upon the selection of an Arbitrator within the allotted period of time, the Federal Mediation and Conciliation Service (FMCS) shall be requested to provide a list of seven (7) names.

2. Discussion

The City proposes to change time limitations for filing a grievance from the current 180 days to 60 days. According to the City, it is prudent to speed up the system. The current time period of six months, in the opinion of the Employer, does not encourage a timely resolution of pending disputes.

The Union concedes that the existing limit of 180 days is long but also that it has worked well over a long period of time. The existing time period gives the parties sufficient time to negotiate about and to attempt to resolve differences of opinion. Moreover, the Union believes that only

infrequently do formal grievances occur and that there is no need to change the current system.

It is a standard presumption of interest arbitrators that a party seeking to change the status quo bears the evidentiary burden of showing that there is a compelling need to make a change. It was the obligation of the Employer to show that its proposed change is something more than merely a good idea and that a solution to a group problem is inherent in the proposal. An interest arbitrator is not charged with selecting final offers on the basis of efficiency or novelty but, rather, in an effort to resolve known problems.

The arbitrator received no evidence to show that the parties' grievance procedure is overburdened with a large number of disputes. Nor was there any evidence that the parties actively use the arbitration process in their grievance procedure. Unrebutted evidence established that only one or two formal grievances have been filed in the past decade. (*See* Tr. pp. 196-197.) No compelling evidence suggested that the current system is not working or that there is a compelling need for a change. No data established that the existing system has created an undue hardship for management.

3. Decision

The Union's proposed change in Article XXIII (Grievance Procedure) shall become a part of the next agreement between the parties.

G. The Issue of Wages

1. Position of the Parties

a. The Employer

Classification	7/1/00	7/1/01	7/1/02	7/1/03
C. Apparatus Operator ** (3 years to 5 years and meet the requirements below)			2885	2971
H. ALS Firefighter (Enhanced EMT-I or greater) ***		160	165	170
I. Hazardous Materials Technician III		100	103	106
J. Self Contained Breathing Apparatus Technician ***		45	46	48
K. Uniform Fire Code ***		48	50	51

**Pay for Apparatus Operator requires successful completion of the following:

* Street Test;
* Apparatus Operations Test (including Aerial/Ladders) and Pumping Evolution;
* Emergency vehicle driving course;
* Maintain a CDL

3. Discussion

The parties approached wages quite differently. The City proposed that wages be increased by 3.61% during the first year of the contract and that they escalate each year to a final amount of 4.39% in the final year of the contract. It is the belief of the City that its proposal is more reasonable than the Union's because it is based on more appropriate data and is within the financial constraints of the Employer. According to the City, a review of comparable cities shows that wages of Missoula firefighters, on average, are well within the typical hourly wage range. The Employer disputes the Union's contention that the use of an hourly wage rate is inappropriate. As the Employer sees it, "the hourly wage rate is the only true measure of an employee's compensation." (*See* Employer's Post-hearing Brief, p. 9.)

It is the position of the Employer that the Union failed to take into account differences in hours worked by firefighters in comparable cities. According to management, most cities that are comparable with Missoula require their firefighters to work approximately a third more hours than is the case in Missoula. This factor necessarily must be considered when reviewing comparable cities for wage comparison. The City concludes, therefore, that the failure of the Union to take account of this variable skewed the Union's

comparable wage data, and the Employer argues vigorously that the Union cannot properly seek a wage for its membership that is similar to wages earned by employees who spend a third more time on the job.

The Employer also justifies its wage proposal on the fact that it exceeds the anticipated cost of living during the contract period. The City believes that its proposed wage increase of 16.9% over the term of the collective bargaining agreement almost certainly will keep pace with increases in the cost of living. Moreover, the Employer asserts that any greater wage increase is not within the financial ability of the City.

The Union responds that there needs to be a "salary adjustment pool" created by the Employer. In the first year of the parties' agreement, the Union seeks a 4% cost-of-living adjustment, with an increase of an additional 3% for the following three years of the agreement. The "salary adjustment pool" concept uses the Employer's method of calculating wage increases and, in the opinion of the Union, adequately accomplishes stated goals of the City. Additionally, the Union believes that its proposed cost-of-living increase for the first year is fully supported by the evidence and concludes that its proposals for subsequent increases actually amounts to less money than does the proposal of the Employer.

Appendix A

b. The Union

FIREFIGHTER CLASSIFICATION SCHEDULE

	7/1/00*	7/1/01*	7/1/02*	7/1/03*
Probationary Firefighter (6 months - 1 year)	2415	2477	2527	2598
Confirmed Firefighter (1 year - 3 years)	2759	2829	2886	2967
3-Year Firefighter (3 years - 5 years)		2901	2959	3042
Firefighter 1st Class (5 years - 10 years)	2899	3077	3139	3227
Senior Fire Fighter (10 years to 15 years)	3036	3222	3286	3378
15-Year Firefighter (15 years or more)			3498	3596
Captain Inspector	3314	3636	3815	3922
Battalion Assistant Fire Marshall Master Mechanic EMS Coordinator	3593	3943	4152	4268
Fire Marshall Training Officer	3871	4108	4327	4448

*City agrees to provide a $10 per month matching contribution to deferred compensation for each employee in the bargaining unit.

According to the Union, using data on comparable wages found in cities used by the Employer as a basis of comparison, the Union concludes that its proposed wage increases are more consistent with those of the comparable entities. Although the Union views the City's methodology for selecting comparable entities as somewhat suspect, it is the position of the Union that, because the Union used the City's comparability data, the Employer should not be heard to dispute its validity. According to the Union, even the City's own data show that the Union's proposal is in keeping with current market conditions and produces comparable wages for members of the bargaining unit.

It is the contention of the Union that the City's wage proposal actually is more generous than the Union's proposal. The Union believes that, based on a standard Consumer Price Index, the overall cost-of-living increase for the first year of the contract will be 4.2%, that is, more than the Union's proposal of 4%. Second, the Union contends that its proposal for the following year is only 3%, while the City proposes 3.5%. Finally, the Union believes that, because it includes special certification pay and longevity pay in its "wage increase" proposal for the third and fourth years of the agreement (and the City does not), the Union's proposal for those years is also less than the City's.

By law and contract, the parties require the arbitrator to follow a system of final offer arbitration. Final offer arbitration is designed to encourage good faith bargaining and to promote settlement during negotiations. The premise of final offer arbitration is that parties will be encouraged to bargain more seriously because they know the discretion of the arbitrator is limited to a choice between the final offers presented by the opposing parties and because they know the arbitrator, by law and contract, may not split between them. The focal point of the entire system is to encourage reasonable offers in the hope that the parties will settle their dispute before proceeding to arbitration. Interest arbitration is an extension of face-to-face negotiations between the parties, and preparation for interest arbitration begins with bargaining at the table. This is even more true with an issue by issue final offer system.

The legislative system failed with regard to wage negotiations between the parties. Being more risk averse, the Union followed the traditional format customarily used by the parties with regard to wage negotiations. Its offer was designed to promote settlement and to assist the parties in locating the settlement zone that, otherwise, can be obscured during the bargaining process. The Employer, however, did not share the same incentive to exchange information with the Union, and its approach was

inconsistent with legislatively mandated final offer arbitration. Instead of using a monthly-annual basis of comparing wages, the Employer used an hourly approach. The methodology used in the Employer's final offer was never discussed at the bargaining table, and the Union learned of it only as the parties proceeded to interest arbitration. As a consequence, the two offers cannot be rationally compared; and the Employer must be assigned the responsibility for that fact. None of these comments is intended as a critique of Assistant Chief Hall's extensive work but merely is intended to point out that responsibility for the incompatible offer lies with the Employer. Whether or not an hourly approach is the only true means of measuring a firefighter's compensation is not the point and, in fact, well may be an accurate statement. But the parties have not bargained on this basis throughout their collective bargaining relationship.

Even if the proposition were accepted that the Union's wage proposal should be tested by the "hours of work" methodology, it would not produce a dispositive result. An arbitrator would need a more complete comparative picture that presented data on staffing conditions, services provided, the nature and volume of calls, pension and health insurance benefits, training time, and a host of similar factors that are best addressed in face-to-face negotiation. It would be inaccurate to premise a decision only on

a differential in total number of hours worked. Additional data are needed to give accurate meaning to the term "hours of work."

Moreover, on its own merits, the Union's wage proposal is not unreasonable. While it cannot adequately be compared with the Employer's proposal, it is clear that some elements in the Union's proposal are less economically generous than the proposal set forth by management; and it is structured in terms consistent with the historic approach to wages of the parties. Additionally, it is clear that the Employer retains reasonable flexibility with regard to taxing authority and budgetary maneuverability.

3. Decision

The Union's wage proposal (Appendix A - Wages) shall become a part of the next agreement between the parties.

H. The Issue of Longevity Pay

1. Position of the Parties

a. The Employer

Longevity shall be calculated at two percent (2%) of the state minimum wage for Firefighters, or $15 implemented for year two, and year four through year eight; $20 for year three, and one percent (1%) of that state minimum, or $7.50 for each succeeding year of service thereafter. For wage and longevity calculation purposes, July 1 of each year shall be the common anniversary date for firefighters of the Local 271 Bargaining Unit.

b. The Union

Longevity/Increment Differential shall be calculated at two percent (2%) of the state minimum wage for Firefighters, or $15 implemented for year two, and year four through eight; $20 for year three and one percent (1%) of that state minimum, or $7.50, for each succeeding year of service thereafter. Effective July 1, 2002, longevity will be calculated at $15 for year two, $20 for year three, and $15 for four through eight and $10 for each succeeding year of service thereafter.

For wage and increment schedule calculation purposes, July 1 of each year shall be the common anniversary date for firefighters of the Local 271 Bargaining Unit.

3. Discussion

With regard to longevity pay, the Employer proposes current contract language. The City challenges the Union's proposed increases and argues that they are unreasonable and inequitable. According to the

Employer, the cost for the additional pay based on years of employment far outweighs any benefit to the City.

The Union responds that the membership deserves a longevity pay increase of $2.50 over the current $7.50 for each year of service after nine years. The Union proposes changes included in the Union's "cost-of-living" adjustment proposal. According to the Union, the current contract amount for longevity pay has stagnated and needs to be increased.

The Union failed adequately to justify its "longevity pay" proposal. Such compensation might be explained as a retention mechanism, but no evidence suggested that there is an employee turnover problem in the department. It is insufficient without proof to suggest that a benefit has "stagnated," and it is necessary to set forth some principled basis for advancing a bargaining proposal. In the absence of such data, the proposal does not merit inclusion in the agreement.

It cannot be argued that a benefit is stagnating when the Employer has proposed to increase longevity pay by 37% during the term of the agreement. The City would add $32,853 to longevity pay during the duration of the agreement, but the Union sought $58,704. The Union failed to advance any substantial justification for the additional 16%.

3. Decision

The Union's proposal on Longevity Pay in Appendix A shall not become part of the next agreement between the parties.

I. The Issue of Special Certification Pay

1. Position of the Parties

a. The Employer

* Effective 1/ 1/02 (or within six months of the arbitrator rendering a decision) Confirmed Firefighter through Captain positions will be required to maintain certification as EMT-D/CPR Instructor. Eighty ($80) dollars will be added to each person's pay in these positions. The $80 will not be in addition to ALS Firefighter pay. Classes for EMT-D and CPR Instructor will either be offered on shift or count towards FLSA hours worked. Hours spent off shift maintaining the certification(s) in categories H and I above will not count as FLSA hours worked. If an employee takes a position other than Firefighter-Captain where EMTD/CPR Instructor is not required; it is the employee's responsibility to maintain that capability, if the employee wishes to return to a Firefighter/Captain position. Employees in the "H" category above will only receive EMS pay at that level. EMT-basic, EMT-D, and CPR-I pay will not be compounded.

Positions will be available for up to (12) members (3 per shift) of the department who actively participate in the Haz Mat Tech team.
Positions will be available for up to four (4)(l per shift) SCBA Certified Repair Technician.
Positions will be available for up to (1) ALS Fire Fighter per station (4 per shift).
Positions will be available for up to (4) members of the Fire Prevention Bureau that are Uniform Fire Code Certified.

The positions in categories H-K in Appendix A, Firefighter Classification

Schedule, will be assigned based on the employee(s) length of continuous certification and will instruct in area of expertise as directed. These positions will not be affected by Article XIX and the 45-day limit on filling positions. ALS and Haz Mat stations will be staffed according to the availability of qualified, certified firefighters. Haz Mat Techs and ALS Fire Fighters will be replaced when a position is vacant due to illness or approved leave. A member not assigned a position as a Haz Mat Tech or ALS Fire Fighter, but who carries the minimum qualifications/certification of the position, may fill an assigned position that is vacant due to approved leave as outlined above and receive differential pay. The differential pay will be whatever the ALS or Haz Mat monthly rate of pay is, multiplied by 12, divided by 2191 to establish the hourly differential pay rate. A member who moves to another shift for tier alignment, vacation pick purposes or promotion, relinquishes their [sic] status if that shift already has a full compliment [sic] of specialty members. It is understood by both parties that these positions will be in accordance with new requirements outlined by State and/or Federal regulations and recommendation(s) of the Medical Director and/or the Chief or his/her designee. It is understood by both parties that if the department takes on ambulance transport, the appropriate provisions of this contract or any new provisions will be subject to the collective bargaining process and negotiations will commence as soon as possible regardless of contract expiration date.

b. <u>The Union Position on Special Certification Pay</u>

Certification Pay: The following amounts will be added to the monthly base pay of employees who achieve and maintain the following certifications. Certification pay will be considered as "regular pay" for the purpose of calculating pension contributions.

Emergency Medical Technician	2% of confirmed firefighter base pay
EMT - Defibrillator	3% of confirmed firefighter base pay
EMT - Intermediate (1985 or equivalent)	4% of confirmed firefighter base pay
EMT intermediate (expanded)	5% of confirmed firefighter base pay
EMT - Paramedic	6% of confirmed firefighter base pay

The EMS certification pay listed above is not cumulative and applies to the employee's highest level of certification only.

Cardio-Pulmonary Resuscitation Instructor	1% of confirmed firefighter base pay
Uniform Fire Code Certification	1% of confirmed firefighter base pay
Certified SCBA Repair Technician	2% of confirmed firefighter base pay

Certification as an Emergency Medical Technician must be obtained and retained to receive pay for any level of certification.

In order to receive certification pay as CPR-I, employees must teach classes of sufficient number to meet American Heart Association requirements for certification.

Certification pay will be available for up to five (5) members of the department who actively participate in the SCBA Repair Technician Program.

2. Discussion

The City's proposal includes a limitation on the number of firefighters who hold special medical certification and, consequently, places a limitation on an employee's right to trade shifts with another employee. Under the City's proposal, a defined number of certified firefighters are permitted on a given shift; and a non-EMS certified firefighter would not be permitted to trade shifts with a certified firefighter. The purpose of the limitation, according to the Employer, is to balance shifts more evenly in order to distribute services to the community more effectively. Additionally, the Employer believes that limiting the number of certified firefighters will

also limit the amount of special certification pay due employees and will translate into a significant saving for the City.

It is the Employer's view that a greater need for emergency medical services in recent years dramatically has changed the role of firefighters in the community. It is essential, in the view of the Employer, that each shift of employees be staffed by a sufficient number of EMS-qualified personnel to provide the necessary level of service. By precluding shift trading between certified and noncertified employees, the Employer hopes to insure that emergency medical services will be available at any given time and in any given area of the city. Additionally, the Employer believes it would be financially impossible to allow all qualified employees to obtain EMS certification. First, the Employer does not believe it could afford the training costs. Second, the Employer does not believe it could afford contractually mandated pay increases for those who possess special certification. Accordingly, the Employer has concluded that a limitation is necessary on the number of employees who may be certified in an effort to respond to these concerns.

The Union's proposal increases the amount of pay for those who hold different types of medical certification. It is the belief of the Union that the current pay levels provide an insufficient incentive to firefighters to obtain

medical certification; and such incentives are needed in view of the changing role of emergency personnel. The Union's offer includes a percentage-based formula for awarding special certification pay to qualified employees, and the amount is included in the annual cost of living adjustment proposal. It is the belief of the Union that a pay increase for those with special medical certification is necessary if the Employer is to maintain its status as having "one of the most advanced and reliable EMS systems currently in existence." (*See* Union's Post-hearing Brief, p. 34.)

The Union believes that the Employer's limitation on the number of firefighters who may obtain certification pay is unreasonable. In the Union's view, there is a growing need for EMS qualified firefighters; and the expense for the Employer is not significant. Moreover, additional certification pay is necessary to give firefighters adequate incentive to obtain such training, in the view of the Union. Given the imminent reasonableness of its proposal, the Union believes it should be adopted.

The parties' proposals on certification pay represent another area where final offer arbitration failed to work its magic by driving the positions of the parties closer and closer together. Both parties stand on principle and believe the other lacks insight into what is in the interest of the public. Each party has raised legitimate and substantial concerns with the

opposing proposal. There was no rebuttal to the fact that the Union's proposal produces a heavy financial burden for the Employer, but the Employer's proposal eliminates a historic benefit of enormous importance to the entire bargaining unit, namely, shift trading. The law demands that one or the other of the two unacceptable proposals be adopted by the arbitrator. When legitimate interests of the parties are closely balanced, a principled approach to resolving such a deadlock is to ask, "What is in the best interests and welfare of the public?" Instead of focusing primarily on institutional concerns of the Employer or the Union, it brings reasonable clarity to such a problem to attempt to let the voice of the community resonate.

The most often cited context for defining "the interests and welfare of the public" is an economic one. Scholars who have pondered the meaning of "the interests and welfare of the public" have viewed the phrase in terms of its impact on the financial burden of taxpayers, on the availability of resources for capital improvement to benefit the community, and on the level of increased services to citizens. (*See, e.g.*, Anderson, 56 Fordham L. Rev. 153 (1987).)

In the same section where the Montana legislature listed "the interests and welfare of the public," the lawmakers also included "the financial ability of the public employer to pay." (*See* § 39-34-103(5)(b).) By

linking "the interests and welfare of the public" with "the financial ability" of a public employer to fund a proposal, it is reasonable to conclude that legislators saw a reasonably close relationship between the two concepts. "The interests and welfare of the public" is not a stand alone value and does not itself deserve more weight than other legislative factors. At the same time, it provides a useful guideline when legitimate interests of the parties are closely balanced. The abstract legislative language, of course, must be given meaning within the context of the two final offers advanced by the parties.

The Union maintains that firefighters will not seek special certification if a rule limits their ability to trade shifts. This, of course, is a speculative conclusion, and at the core of the American system of work is a fundamental belief that economic incentives induce people to limit their personal freedom. There is no basis for concluding that this particular work force is different. Of importance is the fact that the Union's proposal increases the Employer's financial burden while failing to provide the community with the same quality of emergency medical service provided by the Employer's proposal. It is the Employer's goal to provide the community with a response from a certified emergency medical technician anywhere in the coverage area within four minutes of a call, and it clearly is within the

interest and welfare of the public to provide such service. Nor did the arbitrator receive evidence challenging the Employer's conclusion that it is not in the best interest of the public to pay fire inspectors, training officers, or battalion chiefs to be certified in Advanced Life Support or as HazMat Technicians when they rarely, if ever, are called on to use such skills in their respective capacities.

3. Decision

The Employer's proposal on Special Certification pay shall become a part of the next agreement between the parties.

J. The Issue of Insurance

1. Position of the Parties

a. The Employer

Health/Dental Insurance - City Proposal

Section 1. In accordance with Montana Code Annotated 7-33-4130(1)(a), the medical, optical and dental insurance provided to union members shall be the same as provided to the other City employees covered under the Employer's self-funded benefit plan. Premium contributions must be equal

to premiums adopted by the City Council to be charged to other active employees, spouses and dependents enrolled on the City's health insurance plan. The union agrees to accept changes in premium contribution or health plan structure and design deemed necessary and implemented by the City Council.

Section 3. The Union shall appoint one (1) bargaining unit member to the Missoula City Employee Benefits Committee (EBC). It shall be the Employer's duty to notify the Union of all meetings. The City agrees to work with the Association on premium and benefit issues through the Employee Benefits Committee (EBC).

Section 4. The Employer agrees that during FY 01 the City will contribute three hundred and ninety dollars ($390.00) per employee per month, during FY 02 and through the term of this contract the City will contribute at least four hundred and forty dollars ($440.00) per employee per month.

Section 5. Premium contributions for dependents will be retroactive to September 2000. Dependent contributions for FY01 and FY02 will be as follows:

	FY01	FY02
Spouse	$25.00/mo.	$45.00/mo.
Dependent Child (each)	$ 5.00/mo.	$10.00/mo.

b. <u>The Union</u>

Health/Dental Insurance - Union Proposal

Section 1. The Employer agrees to contribute one hundred percent (100%) of the self-insured benefit plan premium for covered employees and their spouses and dependents. Insurance coverage, out-of-pocket limitations, deductibles and benefit levels (as approved by the City Council and in effect for other City employees on July 1, 2001) shall not be changed without first giving the Union reasonable advance notice of the change and providing the Union with the opportunity to engage in collective bargaining.

Section 3. The Union shall appoint one (1) bargaining unit member to the Missoula City Health Insurance Committee. It shall be the Employer's duty to notify the Union of all meetings.

2. Discussion

The City proposes a number of changes to the current insurance coverage in the 1997-2000 collective bargaining agreement. In sum, the City's final offer includes a limit on premium payment made by the Employer, restrictions on coverage for members of an insured employee's family, and a retroactive reimbursement for premium payments made by the Employer over the past two fiscal years. Initially, the Employer challenged the Union's position that insurance coverage must mandatorily be bargained rather than arbitrated. According to the Employer, the time pressures involved in a matter of this magnitude make the lengthy bargaining process unacceptable. While conceding that ordinarily such matters are to be decided at the bargaining table, the City took the position that the parties already had spent considerable time attempting to negotiate an agreement and that, since the parties' contract required proceeding to arbitration in the absence of an agreement, arbitration of the insurance issue was required.

It is the belief of the Employer that the current level of insurance benefits provided by the parties' agreement is simply impossible to maintain. It is the conclusion of the Employer that, if the Union's final offer on insurance is adopted, it raises a serious prospect of derailing the city-wide insurance program enjoyed by all employees of the Employer. (*See*

Employer's Post-hearing Brief, p. 14.) The Employer argues that it simply cannot afford the different benefit levels and contribution levels in this bargaining unit that are substantially different from those in other bargaining units with whom the Employer negotiates.

The Union, in effect, seeks to continue the same basic approach to insurance enjoyed under the 1997-2000 agreement, and the Union would require the Employer to continue paying all premiums. It is the belief of the Union that its proposal is far more reasonable than the Employer's for a number of reasons.

First, the Union insists that the Employer has the ability to fund its proposal because Montana law exempts an employer's contribution to premiums paid in group health plans from property tax limitations. Accordingly, any property tax cap imposed by the citizens of Missoula does not apply to generating funds to pay for insurance coverage, according to the Union. In the view of the Union, the language of the law itself belies the Employer's contention that it no longer can afford to pay for premiums based on its inability to collect more property taxes.

From a structural standpoint, the Union believes that the provision of health insurance is not properly an arbitrable issue. According to the Union, a decision with regard to insurance must be a product of the

bargaining process. The Union argues that accepting the City's proposal would constitute a "waiver of the Union's right to bargain about coverage." (*See* Union's Post-hearing Brief, p. 39.) Additionally, the Union contends that its participation in a committee created to advise the Employer on insurance matters cannot be considered "bargaining."

Finally, the Union argues that to accept the City's final offer on insurance would work an immense hardship on members of the bargaining unit. Not only would bargaining unit members lose a significant amount of insurance coverage, but also, they would be required to repay all premium payments made by the Employer since September, 2000. The Union believes this provision will have unimaginable financial consequences on individual employees and cannot be justified, especially since the Employer has the ability to pay for the current level of coverage.

The issue of insurance coverage proved to be the most contentious topic between the parties. Either proposal has an enormous impact on the parties. At first blush, the Union's proposal seemed unproblematic in that it seeks merely to maintain the current structure set forth in the parties 1997-2000 agreement. The Employer, however, has responded with extremely compelling reasons for making a change.

First, the Employer has been highly persuasive with regard to its needs to maintain uniformity in its coverage of all employees, both those within the firefighters' bargaining unit as well as members of other unions with whom the Employer bargains. Clear and convincing evidence established that other unions acknowledged precarious financial circumstances of the City and recognized the need for substantial restructuring of the insurance package. Unrebutted evidence established that other unions agreed to accept significant reductions in their insurance coverage and made the sacrifice in an effort to maintain evenhanded coverage of all employees. Permitting the firefighters' bargaining unit to maintain its current coverage while other similarly situated employees of the City would not be so privileged would have a long-lasting and dramatic impact on the cohesiveness of a large group plan. This factor, coupled with the Employer's lack of wealth, established a genuine need on the part of the Employer for a change. If the Employer is not permitted to make its proposed changes to the insurance package of the firefighters' bargaining unit, management may well be compelled to attempt to re-bargain with other unions who already acquiesced to the changes. A myopic view cannot be taken of the Employer's ability to fund the insurance package for this solitary bargaining

unit, for some account must be take of the ability to pay for the relative same level of coverage for all city employees.

At the same time, it is recognized that the consequences of the change proposed by the Employer is enormous for members of this particular bargaining unit. Aside from reductions in coverage which would have to be borne by individual employees, the Employer proposes retroactively to charge bargaining unit members for premium contributions for employee dependents made after September, 2000. The personal financial consequences of this particular provision are enormous. It is a "sleeper" issue that taints the entire final offer and impugns the fairness of the proposal

While the City's ability to pay is an important factor, so is consideration of the economic impact of the City's proposal on individual employees. This single, seemingly small provision in the midst of all the other highly technical issues presented with regard to insurance is a knotty sticking point. The burden on individual employees to pay all premium contributions made by the city for each dependent over a period of almost two years is more than it is reasonable to expect an employee to bear. The Montana legislature instructed an interest arbitrator to make "a just and reasonable determination" with regard to who submits the most sensible final offer. While recognizing the pressures on the City, it is more just and

reasonable to maintain the basic structure used by the parties in their last agreement than to authorize the sort of backfilling called for by the Employer. Were it not for this single provision in the Employer's final offer on insurance, its position would be adopted. But the positions of the parties may not be compromised by an interest arbitrator, and it simply is unfair to permit the Employer to issue employees a Letter of Demand for what could amount to thousands of dollars. Such a result simply would not be reasonable, and the arbitrator has a contractual obligation imposed by the parties to select the "most reasonable offer" of the final offers submitted by the parties. (*See* Article XXVI(5)(C) of the 1997-2000 agreement between the parties, p. 13.)

3. Decision

The final offer of the Union on Insurance shall become a part of the next agreement between the parties.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that:

1. The Issue of Clothing Allowance: The proposal of the Employer with regard to clothing allowances shall become a part of the next agreement between the parties.

2. The Issue of the Work Week: The Employer's proposal with regard to Work Week shall become a part of the next agreement between the parties.

3. The Issue of Overtime Pay: Article XIV (Overtime Pay) as it appeared in the 1997-2000 agreement shall continue to be a part of the next collective bargaining agreement between the parties.

4. The Issue of Sick Leave: The Employer's proposal with regard to Sick Leave shall become a part of the next agreement between the parties.

5. The Issue of Vacancies-Promotions: The Employer's proposal with regard to Article XIX (Vacancies-Promotions) shall become a part of the next agreement between the parties.

6. The Issue of the Grievance Procedure: The Union's proposed change in Article XXIII (Grievance Procedure) shall become a part of the next agreement between the parties.

7. The Issue of Wages: The Union's wage proposal (Appendix A - Wages) shall become a part of the next agreement between the parties.

8. The Issue of Longevity Pay: The Employer's proposal shall and the Union's proposal on Longevity Pay in Appendix A shall not become part of the next agreement between the parties.

9. The Issue of Special Certification Pay: The Employer's proposal on Special Certification Pay shall become a part of the next agreement between the parties.

10. The Issue of Insurance: The final offer of the Union on Insurance shall become a part of the next agreement between the parties.

It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow,
Professor of Law

Date: 5-29-02